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No. 87-1657

In the Supreme Court of the United States

OCTOBER TERM, 1987

GIROLEMO MUSSO, ET AL., PETITIONERS

v.

JAMES A. BAKER, III, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether trustees of an employee benefit plan may comply with the bonding requirement of Section 412(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1112(a), by depositing with the Secretary of Labor governmental obligations owned by the plan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 834 F.2d 78. The opinion of the district court (Pet. App. 7a-12a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on December 2, 1987. A petition for rehearing was denied on December 29, 1987 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on March 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 412(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1112(a), requires that plan officials (*i.e.*, fiduciaries and others who handle

plan funds) of employee benefit plans subject to ERISA be bonded in the amount of 10% of the plan's assets, up to $500,000. The bond is to "provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of [a] plan official" (29 U.S.C. 1112(a)). Section 412(a) also specifies that "[a]ny bond shall have as surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to sections 9304-9308 of Title 31." [1]

2. Petitioners are the trustees of Teamsters Local 641 Pension Fund, an employee benefit plan subject to ERISA. Until June 1986, plan trustees were in compliance with ERISA's bonding requirement and were covered by a bond backed by a corporate surety (Pet. App. 2a-3a). After certain plan trustees were criminally convicted for fiduciary breaches, however, the surety company refused to renew the bond (*id.* at 8a). Petitioners then made some attempts to secure other bonding through a corporate surety, as required by Section 412, but they did not obtain a bond (Pet. App. 3a, 8a).[2]

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[1] Section 412 excepts certain types of plans (29 U.S.C. 1112(a)(1)) and certain types of fiduciaries (29 U.S.C. 1112(a)(2)) from the bonding requirement. In addition, the Secretary of Labor is authorized by Section 412(e) to exempt plans from bonding requirements where the Secretary "finds that (1) other bonding arrangements or (2) the overall financial condition of the plan would be adequate to protect the interests of the beneficiaries and participants." 29 U.S.C. 1112(e). Pursuant to this section, the Secretary has promulgated regulations at 29 C.F.R. 2580.412 that exempt some classes of plans.

[2] In July 1986, the Secretary of the Treasury published a list of surety companies, approved pursuant to 31 U.S.C. 9305, that contained 164 surety companies licensed to do business in New Jersey, where the plan is located. See 51 Fed. Reg. 23924 (1986). The September 8, 1986, Affidavit of Margaret Zinno, plan administratrix, *reprinted in* Pet. App.

3. Petitioners subsequently brought this action against the Secretary of Labor and the Secretary of the Treasury,[3] seeking a declaratory judgment that the trustees could satisfy ERISA's bonding requirement by depositing with the Department of Labor $500,000 in assets owned by the plan and invested as governmental securities (Pet. App. 3a, 8a). The district court ruled in petitioners' favor, holding that their proposal to deposit plan-owned governmental obligations satisfied Section 412 (Pet. App. 7a-12a). The court relied primarily upon 31 U.S.C. 9303, which allows those persons "required under a law of the United States to give a surety bond" to submit instead government obligations in an amount equal at par value to the amount of the required bond (Pet. App. 10a). The court noted that Section 9303 was not among the provisions of Title 31 specifically referred to in Section 412 of ERISA (Pet. App. 10a n.1). Stating, however, that Section 9303 "deals more specifically with surety bonds," the court held that Section 9303

22a-25a, states that she contacted "[three] companies * * * engaged in [the] surety bond business" and two brokers (*id.* at 23a-24a para. 8).

Petitioners do not fall within either the statutory or regulatory exceptions to ERISA's bonding requirement. See page 2 note 1, *supra.* Moreover, petitioners have not sought an individualized exemption from the Secretary on the basis of the plan's overall financial condition or other bonding arrangements (Pet. App. 24a para. 12).

[3] The Secretary of Labor is charged with enforcement of ERISA's fiduciary responsibility provisions, including the bonding requirement of ERISA Section 412. The Secretary of the Treasury, on the other hand, has no role in the enforcement of ERISA's bonding provisions. For that reason, the Secretary of the Treasury moved in district court for dismissal of the suit against him. Although the motion was denied, the district court's final judgment contained no relief as to the Secretary of the Treasury, and the government therefore did not appeal the ruling on that motion. The court of appeals determined that it did not need to decide whether the Secretary of the Treasury was a proper party in this action. Pet. App. 3a n.1.

should be read in pari materia with Section 412 to authorize petitioners' proposal (Pet. App. 11a-12a).

The court of appeals reversed (Pet. App. 2a-6a). It held that the district court's reliance on 31 U.S.C. 9303 was misplaced, because Section 412 of ERISA specifically refers to 31 U.S.C. 9304-9308, and not to Section 9303 (Pet. App. 5a). In any event, the court concluded that Section 9303(a) would be satisfied only if the persons required to post the bond (here, the trustees) proposed to deposit governmental obligations which they (rather than the plan) owned (Pet. App. 5a). Posting assets owned by a pension plan, the court noted, does not satisfy ERISA, because it does not protect the plan against the risk of loss; in fact, the court found it "disingenuous" for petitioners to suggest that their proposal would satisfy ERISA Section 412 (Pet. App. 5a). As the court explained, under petitioners' proposal, "in the event of a breach of fiduciary duty by one of the Fund's trustees, the Fund's assets would [nonetheless] be diminished by the amount of damage caused by the breach" (*ibid.*). By contrast, if a corporate surety bond covers the trustees, the plan would be reimbursed for its losses, at least up to the limit of the bond (*id.* at 5a-6a). Accordingly, the court held, "the course of action proposed by the trustees does not satisfy the bonding requirement of ERISA" (*id.* at 6a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, review of the decision below is not warranted.

1. The court of appeals correctly ruled that petitioners could not satisfy the bonding requirement of Section 412(a) of ERISA, 29 U.S.C. 1112(a), by depositing plan-owned governmental obligations with the Secretary of Labor. The

court accurately perceived that petitioners' proposal to use assets owned by the plan could not "provide protection to the plan against loss by reason of acts of fraud or dishonesty on the part of the plan official," as the statute expressly requires. 29 U.S.C. 1112(a). If plan assets were used to bond the plan officials, any losses suffered by the plan because of the officials' misconduct could not truly be "reimbursed," because the losses would be paid for with other plan assets, the deposited plan-owned obligations. By contrast, a bond issued by "a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to Sections 9304-9308 of title 31" (29 U.S.C. 1112(a)) would protect the plan by enabling it to recover the loss caused by a fiduciary breach, up to the amount of the bond (Pet. App. 5a-6a).

Petitioners have cited no decision inconsistent with the interpretation of ERISA Section 412 adopted by the court of appeals in this case.[4] Instead, petitioners rely on 31 U.S.C. 9303, which provides that a person who is required under federal law to give a surety bond may instead submit governmental obligations "in an amount equal at par value to the amount of the required surety bond."[5] Petitioners

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[4] The decisions that petitioners cite as in conflict with the decision below (Pet. 9-12) have nothing to do with ERISA or the statute's bonding requirement. Instead, those decisions simply discuss general doctrines of statutory construction in other contexts, particularly the principle of *in pari materia* and the presumption against implied repeals.

[5] Chapter 93 of Title 31, 31 U.S.C. 9301-9309, sets forth a framework of standards, enforcement procedures, and alternatives relating to sureties and surety bonds that are generally required under federal law. The Secretary of the Treasury administers that chapter. He has promulgated regulations relating to surety bonds, 31 C.F.R. Pt. 225, and has published lists of surety companies that hold a grant of authority issued pursuant to 31 U.S.C. 9305. See, *e.g.*, 51 Fed. Reg. 23924 (1986). Sections 9304-9308 deal in particular with the qualifications of surety corporations and government dealings with them.

argue that 31 U.S.C. 9303 and ERISA Section 412 should be read *in pari materia* to authorize a plan official to deposit government securities in satisfaction of the ERISA bonding requirement. But even if these two statutes were read in the manner petitioners suggest, petitioners' proposal would not satisfy the requirements of 31 U.S.C. 9303. A regulation promulgated by the Secretary of the Treasury under that law provides that a person required by federal law to furnish a bond must own the government obligations that are posted as security in lieu of a bond. 31 C.F.R. 225.3; Pet. App. 5a. The governmental obligations that petitioners sought to deposit are owned by the plan, not by the trustees. Accordingly, the court of appeals correctly held that petitioners' proposal can not be justified by reference to 31 U.S.C. 9303.

In any event, as the court of appeals recognized (Pet. App. 5a), Congress expressly required in ERISA Section 412(a) that a bond "shall have as a surety thereon a corporate surety company which is an acceptable surety on Federal bonds under authority granted by the Secretary of the Treasury pursuant to Sections 9304-9308 of title 31." [6] Congress did not refer to Section 9303, presumably because it intended to require a corporate surety bond and did not intend routinely to allow the alternative of posting government obligations in place of such a corporate surety bond.[7]

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[6] There is no merit in petitioners' suggestion (Pet. 15) that 31 U.S.C. 9304(b) prohibits the Secretary of Labor from requiring a corporate surety bond. Chapter 93 plainly contemplates that in many situations federal law will require the posting of a corporate surety bond, see, *e.g.*, 31 U.S.C. 9304(a), and ERISA Section 412(a) does just that.

[7] ERISA Section 412(c) does, however, provide for the Secretary to prescribe regulations providing for the exemption of a plan from the bonding requirements of the Section, and such regulations have been adopted. See 29 C.F.R. Pt. 2580, Subpt. F—Exemptions. Petitioners at no time have attempted to obtain an exemption pursuant to Section 412(c).

2. Petitioners maintain that it is unreasonable for the Secretary of Labor and the court of appeals to disapprove their proposal in light of "the present dearth of available liability coverage" (Pet. 15) and the high cost of securing bonding (Pet. 16-17). Petitioners' inability to secure coverage is undoubtedly related to the past administration of this particular pension plan, which resulted in the criminal convictions of plan trustees for fiduciary breaches. As we explained in the courts below, petitioners err in asserting (Pet. 19-20) that the plan and its trustees are without options. For example, the trustees could reduce their discretion over the funds they handle, and thereby make their situation more appealing to a surety company, by retaining a corporate administrator to handle the receipt of contributions and payments of claims, and by entrusting the plan assets to a bank trust department or to an insurance company for investment. In any event, even if petitioners were correct in their unsupported assertion that ERISA's bonding requirements are unwise in light of present "commercial realit[ies]" (Pet. 9, 15), that is a matter for Congress to consider. It is not a factor warranting review by this Court of the court of appeals' interpretation of ERISA's unambiguous bonding requirement.[8]

[8] Petitioners discuss state "estate bonding law" and assert that some states "authorize the deposit of estate-owned securities in lieu of a fiduciary bond" covering estate fiduciaries (Pet. 17-19). It is difficult to understand the relevance of selected state estate law to the construction of a federal law regulating employee benefit plans. Cf. ERISA Section 514(a), 29 U.S.C. 1144(a) (preempting state law relating to employee benefit plans). In any event, petitioners' state law citations do not support the proposition that a deposit of part of an estate without more (Pet. 18) always adequately protects the estate against fiduciary breach. For example, New Jersey law clearly envisions that state courts may require fiduciary bonds, even when estate-owned securities have been deposited with the court, in order to protect the remainder of the estate. N.J. Stat. Ann. § 3B:15-12 (West 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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